SUPREME COURT, U. S.

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In the

Supreme Court of the United States

October Term, 1970

No. 108 3

Appalachian Volunteers, Inc., *et al.*,

Petitioners,

—v.—

Charles Clark, etc., *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners[*] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on September 11, 1970.

Opinions Below

The opinion of the Court of Appeals is unreported and set forth at Appendix 1a, *infra*. The remand order of the District Court for the Eastern District of Kentucky is unreported and set forth at Appendix 17a, 19a, *infra*.

[*] Petitioners are Appalachian Volunteers, Inc., Steve Brooks, Palmer Frasure, Hershell Nick Frasure, Nick Mallliarakis, David Walls, Woodrow Rogers, Edward Blankenship, Barbara Newsome, and Vernie Hall.

Respondents are Charles Clark, individually and as Superintendent of Schools of Floyd County, and the Floyd County Board of Education.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 11, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether 28 U.S.C. §1446(b) authorizes appellate review of grounds advanced for removal in addition to those based upon 28 U.S.C. §1443(2) and entitles a removing defendant to a stay when the removal order is based upon such additional grounds.

2. Whether Rules 65(b) and 81(c) of the Federal Rules of Civil Procedure extend the automatic expiration of an *ex parte* restraining order issued by the State court prior to removal and the lower court should have dissolved or entered the termination of the order notwithstanding the provisions of 28 U.S.C. §1450.

3. Whether, if 28 U.S.C. §1450 continued the *ex parte* restraining order in effect following removal, the lower courts' refusal to dissolve the order violated the First Amendment and the Due Process Clause of the Fifth Amendment.

Constitutional and Statutory Provisions and Federal Rules of Civil Procedure Involved

This case involves the First and Fifth Amendments to the Constitution of the United States.

This case also involves the removal provisions of the Judicial Code, 28 U.S.C. Sec. 1441 *et seq.* The following statutes are set forth at Appendix 24a-25a, *infra*.

28 U.S.C. Sec. 1442
28 U.S.C. Sec. 1443
28 U.S.C. Sec. 1447(d)
28 U.S.C. Sec. 1450

This case also involves Rules 65(b) and 81(c) of the Federal Rules of Civil Procedure. They are set forth at Appendix 26a-31a, *infra*.

Fed.R.Civ.P. 65(b)
Fed.R.Civ.P. 81(c)

Statement

Since August 12, 1969, Petitioners have been under an injunction, issued herein, which prohibits them from entering upon public school premises in Floyd County, Kentucky, for any reason whatsoever (Appendix 3a, 4a). The injunction was issued *ex parte* by the clerk of the Floyd Circuit Court and has been continued in effect, without a hearing, by the United States District Court and the Court of Appeals. The Petitioners so restrained are parents of school children in Floyd County, other residents active in citizens' groups interested in the proper administration of

public benefit programs, persons in Volunteers in Service to America, and employees of the Appalachian Volunteers, Inc.

This case arises out of controversy over the availability of the benefits of the federally-funded National School Lunch Program to needy children in Floyd County, Kentucky. In November 1968, some of the Petitioners, acting as representatives of the Eastern Kentucky Welfare Rights Organization, met with Respondent Superintendent of Schools of Floyd County to seek information about Floyd County's plans to provide free and reduced-price lunches in compliance with new Federal regulations under the National School Lunch Act, 42 U.S.C. §1751 *et seq.* The new regulations, 33 Fed. Reg. 15674 (1968), for the first time required local school systems to adopt uniform and objective standards for the determination of a child's entitlement to a free or reduced-price lunch. Petitioners discovered that Respondent Clark was unfamiliar with the new regulations, but took no further action. In March 1969, when revised regulations were issued by the Department of Agriculture, organization representatives again met with Respondent Clark in an effort to learn about his plans for compliance. This meeting was followed over a period of months by several other meetings, some of which were attended by Petitioners Volunteers in Service to America. All such meetings took place in the offices of the Floyd County Board of Education.

Criticism of the administration of the school lunch program in Floyd County received national public attention in June 1969. The magazine *Impact* published an investigative study entitled "School Without Lunch", which reported critically on the availability of free and reduced-price lunches in Floyd County.

On July 21, 1969, Respondent members of the Board of Education of Floyd County adopted a Resolution which in terms "declar[ed] all schools and school property off limits to the VISTA and Appalachian Volunteers. . . ." (Appendix 3a).

Following the Federally-prescribed deadline for the public announcement of the county school lunch policy, Respondent Clark failed to make a timely public announcement as to either the availability or the substance of the policy. On August 5, 1969, on behalf of the Eastern Kentucky Welfare Rights Organization, Petitioner Brooks, a VISTA worker, in the company of another VISTA worker and a summer intern of the Law Students Civil Rights Research Council, went to Respondent Clark's office to inspect the policy or obtain a copy of it if it was available. Respondent Clark refused to allow them to inspect the policy and to meet or talk with them. Together with several other persons present, Respondent Clark forcibly ejected the delegation from his office (Appendix 3a).

On August 12, 1969, Respondents commenced this action in the Floyd Circuit Court. Thereupon, also on August 12, 1969, Respondents obtained the issuance, by the Floyd Circuit Clerk, without presentation to a judge and without notice to Petitioners or their counsel, of the restraining order at issue herein. Without further proceedings in the Floyd Circuit Court, Petitioners removed the case to the United States District Court for the Eastern District of Kentucky. Petitioners alleged as bases of removal jurisdiction 28 U.S.C. §§1442, 1443. Although Petitioners anticipated that the District Court *sua sponte* would enter as of record the automatic expiration of the restraining order, the court failed to act. On November 25, 1969, Petitioners filed a

motion in District Court seeking an order entering the previous termination of the restraining order or, in the alternative, dissolving the order. Petitioners requested to be heard orally on the motion. No hearing was held nor was any decision rendered on the motion (Appendix 4a n. 2). On January 14, 1970, four months after the cause was removed, the District Court remanded the case to the Floyd Circuit Court (Appendix 17a).

Petitioners sought review of the remand order in the Court of Appeals and alleged jurisdiction under 28 U.S.C. Sec. 1447(d). After filing Notice of Appeal, Petitioners timely moved the Court for an order entering as of record the previous termination of the *ex parte* restraining order issued by the Floyd Circuit Court, or, in the alternative, dissolving the restraining order. Petitioners argued that by operation of Fed.R.Civ.P. 65(b) and 81(c), the state court restraining order expired automatically ten days after the case was removed to the District Court. In the alternative, if the restraining order did not automatically expire pursuant to Fed.R.Civ.P. 65(b), the District Court's failure affirmatively to dissolve the restraining order was tantamount to granting a preliminary injunction, since the effect was to extend the temporary restraining order beyond the twenty day limit authorized by Fed.R.Civ.P. 65(b) (Appendix 4a-6a).

On September 11, 1970, the Court of Appeals affirmed the District Court's remand order. The Court held that Petitioners had failed to allege sufficient basis for removal jurisdiction under 28 U.S.C. Sec. 1443 and that Petitioners' allegation of jurisdiction under 28 U.S.C. Sec. 1442 was not reviewable on appeal. The Court further held that 28 U.S.C. Sec. 1450 precluded the automatic termination by

Fed.R.Civ.P. 65(b) of the *ex parte* restraining order issued by the state court. The Court held that even if the District Court's inaction following removal was tantamount to a granting of a preliminary injunction, Petitioners failed to pursue an interlocutory appeal under 28 U.S.C. Sec. 1292 (a)(1). The Court held, therefore, that this issue could be reviewed only as an incident of the appeal from the District Court's order remanding the case to the state court, and, therefore, because of the narrow scope of review found under 28 U.S.C. Sec. 1447(d), declined to review the issue (Appendix 5a-10a).

REASONS FOR GRANTING THE WRIT

Introduction

The removal provisions of the Judicial Code are a unique conferral of jurisdiction to the federal courts. By their operation, certain defendants in actions commenced in a state court may remove the case to a federal district court. When properly invoked, removal jurisdiction is generally as broad as the federal court's original jurisdiction,[1] and, while invoked less frequently,[2] the importance of removal in the scheme of federalism is evidenced by its inclusion in the First Judiciary Act of 1789. This petition presents important questions of first impression concerning the scope of appellate review of removal jurisdiction and the ap-

[1] 1A Moore's *Federal Practice* ¶0.169[1] (2 ed. 1965); Wright, *Law of Federal Courts* 110 (1963).

[2] In fiscal year 1969, 3,916 cases were removed to district courts compared to 110,778 cases originally commenced in district courts. Annual Report of the Director of the Administrative Office, U.S. Courts 200, 258 (1969).

plication of the Federal Rules of Civil Procedure to removed actions.

Petitioners sought removal herein on the basis of 28 U.S.C. §§1442(a)(1) (persons acting under a federal officer) and 1443(a) (civil rights) and also sought an order recognizing the termination of the *ex parte* restraining order issued by the State court prior to removal. The District Court remanded the action by an order which denied both statutory bases of jurisdiction. Petitioners sought review of the remand order pursuant to 28 U.S.C. §1447(d), and contended in the Court of Appeals that §1447(d) authorizes review of the entire order effecting remand. Petitioners further contended that the *ex parte* restraining order terminated ten days after the case was removed by operation of Rules 65(b) and 81(c) of the Federal Rules of Civil Procedure. The Court of Appeals held, however, that 28 U.S.C. §1447(d) authorized review only of the 28 U.S.C. §1443(2) basis of the remand order and that application of 28 U.S.C. §1450 continued the *ex parte* restraining order in effect notwithstanding Rules 65(b) and 81(c). This decision contracting both the scope of appellate review and the application of the Federal Rules of Civil Procedure to removal actions warrants review by this Court.

I.

Certiorari should be granted to decide the scope of review afforded removing defendants by 28 U.S.C. §1447(d).

This petition presents an important question of first impression concerning the scope of review afforded removing defendants by 28 U.S.C. §1447(d). Petitioners sought removal on the basis of 28 U.S.C. §1442(a)(1) and 28 U.S.C. §1443(2).[3] On review, the Court of Appeals held that while it tended to agree that petitioners were entitled to removal under Section 1442(a)(1), it did not have jurisdiction under 28 U.S.C. §1447(d) to review this basis for removal. The Court of Appeals' restrictive reading of the review provided by §1447(d) is erroneous in light of the language of that provision and the rationale of selective review of remand orders.

Section 1447(d) was amended in 1964 to authorize appeal in cases where 28 U.S.C. §1443 was a basis of removal.[4] The amendment allowing review was a marked departure from the long-standing ban that prevented review of all remand orders.[5] The Congressional policy underlying the

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[3] Petitioners alleged that Volunteers in Service to America were persons acting under a federal officer (§1442(a)(1)) and that they were acting pursuant to the Economic Opportunity Act, 42 U.S.C. §§2701 *et seq.*, and the National School Lunch Act, 42 U.S.C. §§1751 *et seq.*, and by direction of the President and the Director of the Office of Economic Opportunity.

[4] Section 901 of the 1964 Civil Rights Act.

[5] Review of remand orders has been consistently prohibited except for a twelve-year period between 1875 and 1887. Judiciary Act of March 3, 1875, 18 Stat. 470, 472, repealed by Judiciary Act of March 3, 1887, 24 Stat. 552.

prohibition of review is simply to preclude interruption of actions by prolonged litigation over the district court's jurisdiction to hear the matter. *United States* v. *Rice*, 327 U.S. 742 (1946).

But neither this rationale nor the statutory language justifies review of one ground and non review of the other grounds in the same appeal. The language of 28 U.S.C. §1447 provides that the remand *order* is to be the subject of review on appeal. Where the removal petition addduces grounds in addition to those based on 28 U.S.C. §1443, and the District Court denies those grounds explicitly, as in this case, the language of Section 1447 on its face authorizes review of all the grounds considered in the order here the §1442 as well as the §1443 grounds.

Review of non civil rights grounds for removal does not conflict with the Congressional intent in the passage of the Amendment nor will it cause an undue burden on the courts. The Amendment's purpose of providing appellate courts an opportunity to reconsider 28 U.S.C. §1443 in light of its original Congressional intent remains unhampered.[6] Likewise, with the number of removal petitions declining each year in proportion to the number of cases commenced, such review poses no threat to the vitality of the Federal-State judicial balance.[7]

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[6] 110 Cong. Rec. 6551 (remarks of Senator Humphrey); 110 Cong. 6955, 6956 (remarks of Senator Dodd).

[7] In fiscal year 1960, 3700 actions were removed from state court to federal court, as against 83,711 actions commenced in federal court. Annual Report of the Director of the Administrative Office, U.S. Courts 230 (1960); Annual Report of the Director of the Administrative Office, U.S. Courts 200, 258 (1969). In Fiscal year 1969, 3,916 actions were removed to federal court, compared to 110,778 actions commenced in federal court.

The rationale of selective review does not favor distinguishing between jurisdictional grounds in the same appeal. In any case other meritorious grounds may be addressed in addition to those based on §1443. Congress has provided that when §1443 is advanced as a basis for removal, the course of the action may be interrupted for review of the remand order. Since the interruption for review may thus occur, the statutory purpose does not justify the appellate court's refusal to review the entire order.

II.

Certiorari should be granted to decide the effect of removal on *ex parte* restraining orders issued by the state court prior to removal.

A. *The Lower Court Decisions Erroneously Held Rule 65(b) Inapplicable to Ex Parte Orders in Removed Actions.*

The lower court decisions deny to removing parties important rights extended to other civil litigants by the Federal Rules of Civil Procedure. Rule 81(c), however, provides that the Rules apply to all procedure in removed actions. The design of Rule 81(c) is that removed cases are to proceed as if they had been originally commenced in federal court.* *Freeman* v. *Bee Machine*, 319 U.S. 448

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* Former 28 U.S.C. §81 (1940 ed.), revised in 1948 and now embodied in 28 U.S.C. §1447 was the apparent forerunner of Fed.R.Civ.P. 81(c). Revisors' Note, 28 U.S.C. §1447. The statute stated that after removal "the case shall proceed in the same manner as if it had been originally commenced in . . . the federal court." Act of August 13, 1888, c. 866, 25 Stat. 443-45; later 28 U.S.C. §81. In *Weinburg* v. *Colonial Williamsburg, Inc.*,

(1942); *Weinburg v. Colonial Williamsburg, Inc.*, 215 F. Supp. 633 (E.D.N.Y. 1963); *Grimes v. Parmelee Transp. Co.*, 207 F.2d 334 (7th Cir. 1953); 1A *Moore's Federal Practice*, ¶0.168[4.3] fn. 12 (1965). The decision of the lower court holds that Fed.R.Civ.P. 65(b) effecting the automatic termination of *ex parte* restraining orders 10 days after their issuance may not be applied to *ex parte* orders that are removed from state courts. The Court of Appeals' reliance on 28 U.S.C. §1450 as preventing the application of Fed.R.Civ.P. 65(b) to removed orders is untenable. Analysis of §1450 indicates that instead of preventing the termination of state court orders on removed actions, the statute, while guarding against the abrogation of such orders by the act of removal, is the precise grant of authority to district courts to terminate or modify such orders. *Ex parte Fisk*, 113 U.S. 713 (1885); *Perry v. Sharpe*, 8 F. 15, 24 (C.C. Ohio 1881); *Champlain Const. Co. v. O'Brian*, 104 F. 930 (C.C. Vt. 1900). Rule 65(b), made applicable to removed actions by Rule 81(c), merely implements this grant of power as to *ex parte* orders issued by the state court prior to removal and thereby causes their automatic termination 10 days after the case is re-

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215 F. Supp. 633 (E.D.N.Y. 1963), the court set out former 28 U.S.C. §81 and stated:

> The provision is the apparent forerunner of Federal R. Civ. P. 81(c) and should be considered in determining its interpretation [215 F. Supp. at 637].

The Seventh Circuit, in *Grims v. Parmelee Transp. Co.*, 207 F.2d 334 (7th Cir. 1953), interpreted Federal Rule 81(c) as embodying the reasoning of former 28 U.S.C. Sec. 81:

> Defendant was granted by Congress the right to remove the case from state to Federal Court, but when it arrived there, it was subject to the same rules of procedure as if it had been originally sued in that court [207 F.2d at 337].

moved. The lower courts erred in failing to enter the termination in order thereby to notify Petitioners and Respondents that the order was no longer in effect. The courts' failure to enter the termination was tantamount to a non-application of the Federal Rules and had the effect of sustaining the life of the restraining order throughout the time the case has been in federal court.

Instead of the application of Rule 65(b) to removed *ex parte* orders, defendants must move in the district court to dissolve the order. The *ex parte* order consequently remains in effect until the district court hears and renders a favorable decision on such a motion. The time difference between the automatic provisions of Rule 65(b) and a decision on a motion to dissolve works a discriminatory and needless hardship on removing defendants. The punishment occasioned by removing defendants by such a decision merits examination by this Court.

B. *The Court of Appeals' Construction of 28 U.S.C. §1450 Together With Its Refusal to Dissolve the Ex Parte Restraining Order Prolongs the Life of the Restraining Order in Violation of the First Amendment and the Due Process Clause of the Fifth Amendment.*

An additional reason for review of our judgment below lies in the inconsistency of the Court of Appeals' decision with this Court's decisions on procedure in *ex parte* proceedings. As the meaning of due process has evolved, this Court has consistently limited the role of *ex parte* federal court proceedings, particularly in the sensitive area of First Amendment rights. *Carroll* v. *President and Comm'rs. of Princess Anne*, 393 U.S. 175 (1968); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1960); *Quantity of Books* v. *Kansas*,

378 U.S. 205 (1964)). Likewise, the 1966 Amendments to Rule 65(b) reflect a strong policy of this Court disfavoring *ex parte* procedure in the issuance of federal court injunctions.

The order in the present case was issued *ex parte* absent any attempt to notify Petitioners or their counsel. It was issued for a period of unlimited duration. It did not receive judicial consideration and the authority for its issuance was the state court clerk. Most importantly, the restraining order was issued precisely to prohibit Petitioners from exercising rights of free speech, assembly and association protected by the First Amendment. By refusing to apply the automatic provisions of Rule 65(b), the courts below have extended the life of the *ex parte* order beyond the time constitutionally permitted. The extension of an *ex parte* order, particularly one that has as its sole purpose the restriction of protected First Amendment freedoms, directly conflicts with this Court's holding in *Carroll* v. *President and Commissioners of Princess Anne*, *supra*. The Court emphasized that due process permits *ex parte* orders in the First Amendment area only where there is an attempt to notify the opposing side and the order is of *short* duration. The application of the automatic termination provisions of Fed.R.Civ.P. 65(b) to removed *ex parte* orders is required if removing defendants are to be accorded due process of law. *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

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[9] Lower court decisions reflecting this Court's position on *ex parte* proceedings for the issuance of injunctions have consistently stressed the importance of providing notice, albeit informal, to the opposing side. *Pennsylvania Rd. Co.* v. *Transport Workers Union*, 278 F.2d 693, 696 (3rd Cir. 1960); *Arvida Corp.* v. *Sugarman*, 259 F.2d 428, 429 (2d Cir. 1958); *Lummus Co.* v. *Commonwealth Oil Ref. Co., Inc.*, 297 F.2d 80, 83 (2d Cir. 1961).

The Court of Appeals held that 28 U.S.C. §1450 denied to Petitioners the benefit of Rule 65(b). Under this construction, of §1450, if the court, as here, refuses by affirmative order either to dissolve or, upon hearing, extend the *ex parte* restraining order, the order remains in effect in violation of the First Amendment and the Due Process Clause of the Fifth Amendment.

These constitutional guarantees cannot be frustrated by decision that they have been statutorily withheld from removing parties. A decision so restricting the Court's decisions on due process warrants review by the Court.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals—Sixth Circuit

Nos. 20255-20256

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPALACHIAN VOLUNTEERS, INC., *et al.*,

Petitioners-Appellants,

—v.—

CHARLES CLARK, *et al.*,

Respondents-Appellees,

EDWARD LEE BLANKENSHIP, *et al.*,

Plaintiffs-Appellants,

—v.—

CHARLES CLARK, *et al.*,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed September 11, 1970.

Before: WEICK, McCREE, and BROOKS, *Circuit Judges.*

McCREE, *Circuit Judge.* These consolidated appeals present issues related to appellants' attempts to invoke the

jurisdiction of the federal district court. Appellants are members of Volunteers in Service to America (VISTA), members of Appalachian Volunteers, Inc., and local residents of Floyd County, Kentucky who are active in citizens' groups interested in the administration of welfare programs. In case number 20255, they appeal from an order of the District Court remanding to the Floyd County, Kentucky Circuit Court an action for injunctive relief originally commenced by defendants-appellees in the state court but subsequently removed to the federal district court by appellants. In case number 20256, they appeal from an order of the District Court dismissing their complaint requesting declaratory and injunctive relief pursuant to 28 U.S.C. §2201 and 42 U.S.C. §1983 respectively.

The dispute which spawned this litigation began in November, 1968. Some of the appellants, acting as representatives of the Eastern Kentucky Welfare Rights Organization, met with the Superintendent of Schools of Floyd County, Charles Clark, in an effort to obtain information about his plans for compliance with a newly issued set of Department of Agriculture regulations promulgated pursuant to the National School Lunch Act, 42 U.S.C. §§1751 et seq., and designed to enable local school authorities to utilize the Act's free and reduced price lunch program. The representatives discovered that Superintendent Clark was unfamiliar with the new regulations, but took no further action until March, 1969, when a revised set of guidelines was issued by the Department of Agriculture. After the announcement of the new guidelines, the representatives of the Eastern Kentucky Welfare Rights Organization again met with Superintendent Clark in an effort to learn about his plans for compliance. This meeting was followed

over a period of months by several other meetings, some of which were attended by appellant Brooks, a VISTA worker.

The meetings apparently succeeded only in creating strained relations between the parties involved, and, on July 21, 1969, the members of the Board of Education of Floyd County reacted by adopting a resolution which declared "all schools and school property off limits to the Vista and Appalachian Volunteers". Despite this resolution, appellant Brooks and other VISTA workers attempted twice to meet with Superintendent Clark at his office in order to ascertain whether a compliance policy had been adopted. However, they were ejected from the premises both times. Moreover, on August 12, 1969, Superintendent Clark and the Board of Education, acting in their official capacities, filed a complaint in the Floyd County Circuit Court to enjoin appellants "from trespassing upon any property under the ownership, control or operation of the Floyd County Board of Education". Although the Circuit Judge was absent from Floyd County at the time the complaint was filed, the Floyd County Circuit Court Clerk signed, *ex parte*, a temporary restraining order pursuant to his authority under Rule 65.03, Kentucky Rules of Civil Procedure.[1] This order, which had no termination date, restrained appellants "from trespassing upon the property of the Floyd County Board of Education".

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[1] The rule provides, in pertinent part:

> A restraining order may be granted by the judge of the court in which the action is pending, by the clerk of that court or the county judge of that county if the judge of that court is absent from the county, or by such clerk or county judge or any circuit judge if the judge of that court is disqualified or absent from his judicial circuit.

Rule 65.03(2), Ky. Rules of Civ. P.

It does not appear in the record how long the Circuit Judge was absent from the County. However, on September 2, 1969, appellants filed a removal petition in the federal district court, predicated upon either 28 U.S.C. §1442 or 28 U.S.C. §1443. Three days later, on September 5, 1969, appellants also filed an original action for declaratory and injunctive relief under 28 U.S.C. §2201 and 42 U.S.C. §1983. In this action, appellants sought a declaration that the resolution of the Board of Education and the temporary restraining order enforcing it are invalid under the United States Constitution. They also sought an injunction prohibiting Superintendent Clark and the members of the Board of Education from enforcing the resolution and temporary restraining order and from further attempting to prevent appellants' peaceable presentation of grievances to the Board.

More than four months later, on January 14, 1970, the District Judge entered an order remanding to the Floyd County Circuit Court the cause of action in which Superintendent Clark and the Board of Education sought injunctive relief. Two days later, the District Judge dismissed appellants' action for declaratory and injunctive relief.

Case No. 20255

At the outset, we consider appellants' motion, filed prior to oral argument on appeal, "to enter the previous termination of, or in the alternative, to dissolve the restraining order" originally obtained in the Floyd County Circuit Court.[*] Appellants observe that jurisdiction of appellees'

[*] Appellants filed this same motion in the District Court. However, the District Judge did not rule on it, and he apparently concluded that his remand order made a decision on the motion unnecessary.

injunction proceeding automatically vested in the federal district court upon compliance with the procedural requirements for removal contained in 28 U.S.C. §1446. *See* 28 U.S.C. §1446(e); *Wood v. De Weese*, 305 F. Supp. 939, 941 (W.D. Ky. 1969). Appellants therefore contend that under Rule 81(c), Fed. R. Civ. P., which provides that the Federal Rules of Civil Procedure apply to all removed actions, Rule 65(b), Fed. R. Civ. P., became the rule of procedure governing the *ex parte* temporary restraining order issued by the Clerk of the Floyd County Circuit Court. Rule 65(b) provides, in pertinent part:

> Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period. . . .

Accordingly, appellants assert that the temporary restraining order expired no later than ten days after their removal petition was filed and that this court should enter an order confirming that fact.

The answer to this contention is that 28 U.S.C. §1450 expressly provides that:

> All injunctions, orders and other proceedings had in [a removal] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

This clear statutory command must take precedence over the arguably contrary rule of procedure, and it would seem to preclude the automatic termination of the temporary restraining order obtained in the state court.

Appellants contend, however, that even if the temporary restraining order did not automatically expire under Rule 65(b), the District Judge's failure to enter an order dissolving it was tantamount to granting a preliminary injunction, since the effect of his inaction was to extend the temporary restraining order beyond the twenty day limit authorized by Rule 65(b), Fed. R. Civ. P. *Cf. National Mediation Board* v. *Air Line Pilots Ass'n, Int'l*, 323 F.2d 305 (D.C. Cir. 1963); *Pan American World Airways* v. *Flight Eng'rs Int'l Ass'n*, 306 F.2d 840 (2d Cir. 1962). Appellants further contend that the implied grant of the preliminary injunction was appealable under 28 U.S.C. §1292(a)(1) and that we should dissolve the preliminary injunction since it is not supported by "findings of fact and conclusions of law" as required by Rule 52(a), Fed. R. Civ. P.

Even if appellants are correct about the effect of the District Judge's inaction following removal, they did not pursue an interlocutory appeal under 28 U.S.C. §1292(a)(1) to test their contention that there was an implied grant of a preliminary injunction. Accordingly, we can review this issue, if review is appropriate, only as an incident of the appeal from the District Judge's order remanding the case to the state court. Because of the limited scope of appellate review of remand orders authorized by 28 U.S.C. §1447(d), we consider such review inappropriate. Section 1447(d) provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

The obvious purpose of this section is to avoid the delays which would result if appeals from remand orders were permitted. *Kloeb v. Armour & Co.*, 311 U.S. 199, 204 (1940); *Matter of MacNeil Bros. Co.*, 259 F.2d 386, 388 (1st Cir. 1958). Moreover, even when removal is based on 28 U.S.C. §1443 and an appeal is authorized, the review of issues other than those directly related to the propriety of the remand order itself would frustrate the clear Congressional policy of expedition, and we decline to do so. We consider this approach particularly appropriate when, as here, we affirm the remand order of the District Judge (*see infra*).

Appellants alleged in their original removal petition that removal was proper either under 28 U.S.C. §1442 or under 28 U.S.C. §1443. They did not, however, specify under which subsection of either of these statutory provisions removal was authorized. The District Judge held that the failure to aver under which subsection of section 1442 removal was appropriate, and the failure to expressly allege that the VISTA workers were persons acting under an officer of the United States, necessitated a remand to the state court. This ruling presumably was based on appellants' failure to provide "a short and plain statement of the facts which [entitled them] to removal" as required by 28 U.S.C. §1446(a). The District Judge also held that the removal petition failed properly to allege a basis for removal under 28 U.S.C. §1443 because there was no allegation that at the time appellants' activities were enjoined they were acting pursuant to a federal law providing "for specific civil rights stated in terms of racial equality".) *Georgia* v. *Rachel*, 384 U.S. 780, 792 (1966).

On appeal, appellants have attempted, pursuant to 28 U.S.C. §1653, to amend their removal petition in order to clarify which subsections of sections 1442 and 1443 provide

the jurisdictional basis for removal. They assert that under section 1442 the basis for removal is subsection (a)(1) which authorizes removal of an action commenced in a state court against a "person acting under [an officer of the United States]".

Although normally this proposed amendment to the petition would be permissible, *Willingham* v. *Morgan*, 395 U.S. 402, 407 n. 3 (1969); *Firemen's Ins. Co.* v. *Robbins Coal Co.*, 288 F.2d 349, 350 (5th Cir. 1961), we find it unnecessary to decide whether to grant this element of appellants' motion for leave to amend. Under 28 U.S.C. §1447(d), appellate review of a remand order is expressly prohibited where removal was accomplished pursuant to a section other than 28 U.S.C. §1443. Thus, despite our inclination to agree with Judge Solomon's holding in *Oregon* v. *Cameron*, 290 F. Supp. 36, 37 (D. Ore. 1968), that VISTA workers are "'person[s] acting under [an officer of the United States]' within the meaning of 28 U.S.C. §1442(a)", we do not have jurisdiction to review this issue, or to decide whether appellants' removal petition, with or without the proposed amendments, is sufficient. *See House* v. *Dorsey*, 408 F.2d 1008 (4th Cir. 1969); *In re Bear River Drainage District*, 267 F.2d 849 (10th Cir. 1959).

We do, however, have jurisdiction to review the District Judge's ruling on the appropriateness of removal under 28 U.S.C. §1443. Appellants contend that removal was proper under 28 U.S.C. §1443(2), which authorizes removal of an action commenced in a state court as a result of an act performed "under color of authority derived from [a] law providing for equal rights", and they request permission to amend their removal petition to allege this as a basis for removal. Appellants also contend that the decision in *Georgia* v. *Rachel*, 384 U.S. 780 (1966), is not determinative

since it involved section 1443(1) and was prompted by policy considerations not germane to removal under section 1443(2). In particular, appellants assert that in *Georgia* v. *Rachel* the Supreme Court was concerned about the flood of litigation that would be removed to federal courts if section 1443(1) was not interpreted restrictively to apply only to cases involving "civil rights stated in terms of racial equality". *Id.* at 792; *see Georgia* v. *Rachel*, 384 U.S. at 788 n. 8. The court-imposed limitation in section 1443(2) restricting removal to cases involving federal officers and persons assisting federal officers, *Greenwood* v. *Peacock*, 384 U.S. 805, 815 (1966), effectively forecloses a floodgates problem under this subsection, and, appellant contends, eliminates the necessity of restricting removal to racial equality cases.

Although we grant appellants' motion to amend their removal petition in this respect, we nevertheless affirm the District Court's order remanding the injunction proceeding to the state court. We do not think the Supreme Court intended to limit its definition of the type of "equal civil rights" cases which can be removed pursuant to section 1443 (to subsection (1)). Both subsection (1) and subsection (2), although originally formulated differently, were enacted as part of the Civil Rights Act of 1866. Act of April 9, 1866, c. 31, §3, 14 Stat. 27; *see* Appendix to Opinion of the Court, *Georgia* v. *Rachel*, *supra*. In *Georgia* v. *Rachel*, the Court held that the "legislative history of the 1866 Act clearly indicated that [by that Act] Congress intended to protect a limited category of rights, specifically defined in terms of racial equality". 384 U.S. at 791. Accordingly, the Court concluded that the term "equal civil rights", as used in section 1443(1), applied only to "civil rights stated in terms of racial equality". *Id.* at 792. By

way of analogy, the terms "equal rights", as used in section 1443(2), must refer only to equal rights stated in terms of racial equality."

The logic of this conclusion is supported by the fact that any action against a federal officer or person acting under him can be removed pursuant to 28 U.S.C. §1442(c)(1). Thus, "many, if not all, of the cases presently removable under §1443(2) would now also be removable under §1443 (a)(1)". *Greenwood v. Peacock*, *supra* at 820 n. 17, and this eliminates the need to expansively interpret section 1443(2). *Cf. Williamson v. Morgan*, 395 U.S. 402 (1969).

Accordingly, the order of the District Court remanding this cause to the Floyd County Circuit Court is affirmed.

Case No. 20256

The District Judge dismissed appellants' complaint seeking declaratory and injunctive relief because he concluded that in light of the clear prohibition contained in 28 U.S.C. §2283 against enjoining a state court proceeding he lacked the authority to grant the relief requested.[4] Section 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as

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[3] The fact that section 1443(1) refers to "equal civil rights" whereas section 1443(2) mentions only "equal rights" is of little consequence and probably is attributable to a drafting oversight. Certainly the Supreme Court has indicated that it considers the variance insignificant, since in *Greenwood v. Peacock*, 384 U.S. 808, 824 (1966), it held that "the second subsection of §1443 confers a privilege of removal only upon federal officers or agents . . . affirmatively executing duties under any federal law providing for *'equal civil rights'*" (emphasis added).

[4] The District Judge had remanded the appellees' injunction proceeding to the state court two days prior to his opinion in this case.

expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Appellants contend that the District Court erred because the equitable relief authorized by 42 U.S.C. §1983 does constitute an exception "expressly authorized by Act of Congress" to the prohibition contained in 28 U.S.C. §2283. *Cooper* v. *Hutchinson*, 184 F.2d 119, 124 (3rd Cir. 1950); *Landry* v. *Daley*, 288 F. Supp. 200, 221-25 (N.D. Ill. 1968); *Hulett* v. *Julian*, 250 F. Supp. 208 (M.D. Ala. 1966); *Note*, 21 Rutgers L. Rev. 92 (1966). *Contra*, *Baines* v. *City of Danville*, 337 F.2d 579 (4th Cir. 1964); *Goss* v. *Illinois*, 312 F.2d 257 (7th Cir. 1963); *Sexton* v. *Barry*, 233 F.2d 220 (6th Cir. 1956); *Brooks* v. *Briley*, 274 F. Supp. 538, 553 (M.D. Tenn. 1967), *aff'd per curiam*, 391 U.S. 361 (1968). Appellants also maintain that even if 42 U.S.C. §1983 is not an exception to 28 U.S.C. §2283, the District Judge, nevertheless, had authority to grant injunctive relief under the "unusual circumstances" of this case. This second contention is based on the proposition that section 2283 merely represents a codification of the principles of comity and therefore does not preclude injunctive relief "in those extraordinary cases where the federal injunction is necessary to vindicate clear First Amendment rights". *Machesky* v. *Bizzell*, 414 F.2d 283, 287 (5th Cir. 1969). *See also Sheridan* v. *Garrison*, 415 F.2d 699 (5th Cir. 1969); *Wallace* v. *Brewer*, 39 U.S.L.W. 2002 (M.D. Ala. June 9, 1970).[5]

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[5] Appellants also have suggested that the "superior federal interest" doctrine enunciated in *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957), is applicable in this case. We think

Appellants' second contention was answered recently by the Supreme Court. Discussing the nature of the prohibition contained in section 2283, the Court stated:

> On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondent here has intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. In 1954 when this Court interpreted this statute, it stated: "This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 515-516 (1955). Since that time Congress has not seen fit to amend the statute and we therefore adhere to

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it clear, however, that the Supreme Court restricted its holding in that case to situations where the United States is a party.

> The frustration of superior federal interests that would ensue from precluding the *Federal Government* from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone. It is always difficult to feel confident about construing an ambiguous statute when the aids to construction are so meager, but the interpretation excluding the *United States* from the coverage of the statute seems to us preferable in the context of healthy federal-state relations. *Id.* at 226 (emphasis added).

> that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.

Atlantic Coast Line R.R. Co. v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87 (1970).

Accordingly, appellants' request for injunctive relief necessarily must be based on the proposition that 42 U.S.C. §1983 is "one of the specific statutory exceptions to §2283". Although we find the reasoning of the decisions supporting this position persuasive, we deem it unnecessary, at this time, to re-examine our apparently contrary holding in *Sexton* v. *Barry*, 233 F.2d 220 (6th Cir. 1956).

Appellants sought relief pursuant to the grant of equity jurisdiction contained in section 1983. We therefore must apply equitable principles in determining whether appellants were entitled to equitable relief. We conclude that in light of their failure to pursue what appears to be an adequate remedy at law, appellants were not entitled to equitable relief. *See Potwora* v. *Dillon*, 386 F.2d 74 (2d Cir. 1967); *Grayson* v. *Montgomery*, 421 F.2d 1306 (1st Cir. 1970).

The Kentucky Rule of Civil Procedure, pursuant to which the appellees obtained a temporary restraining order, provides, in pertinent part:

> Unless [the restraining order] provides an earlier termination date, a restraining order shall remain in force until, and not after, (1) the time set for a hearing on a motion to dissolve the restraining order unless there is then pending a motion for a temporary injunction, or (2) the entry of an order on a motion for a temporary injunction, or (3) the entry of a final judgment, whichever is earlier. Rule 65.03(5), Ky. Rules of Civ. P.

Appellants did not file a motion to dissolve the restraining order prohibiting their presence on school property, and they have provided no proof that to do so would have been unavailing.

We hesitate, in the absence of any evidence to the contrary, to speculate that the Circuit Judge of Floyd County would not conduct an immediate hearing on a motion to dissolve. Indeed, we seriously doubt whether, under the authority of the Supreme Court's decision in *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Circuit Judge would do anything other than declare the temporary restraining order invalid. In *Carroll*, the Supreme Court set aside a restraining order of ten days duration

> because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex*

parte issuance, without notice, of temporary restraining orders of short duration, but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

* * *

The Court has emphasized that "[a] system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U. S. 58, 70 (1963); *Freedman* v. *Maryland*, 380 U. S. 51, 57 (1965). And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit.

Id. at 180-81.

The temporary restraining order obtained by appellees would seem to suffer from the same procedural infirmities condemned by the Supreme Court in *Carroll*.[6]

Of course, approximately three weeks after the issuance of the temporary restraining order, appellants filed their removal petition and effectively suspended any further proceedings in the state court during the pendency of the case

[6] In fact, the temporary restraining order would seem to suffer from the additional infirmity that it was granted by the Clerk of the Floyd County Circuit Court instead of by the Circuit Judge. However, this fact also serves to support our reluctance to conclude that the legal remedy available to appellants is inadequate. If the *ex parte* temporary restraining order had been granted by a judge, we would be less inclined to conclude that an adequate legal remedy apparently does exist.

in the federal district court. 28 U.S.C. §1446(e). Moreover, appellants had a right to remove the injunction proceeding and we do not mean to imply by our decision that appellants are being penalized because they did so.

However, removal of the proceeding, which included the risk of remand, does not excuse appellants' failure to seek dissolution of the temporary restraining order in the Floyd County Circuit Court during the first three weeks it was in effect; nor does it relieve them from the obligation now to pursue the available legal remedy provided by Rule 65.03 (5), Ky. Rules of Civ. P., prior to invoking the federal court's equity jurisdiction under 42 U.S.C. §1983.[7]

Accordingly, the order of the District Court dismissing appellants' complaint is affirmed.[8]

Affirmed.

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[7] It is interesting that appellants did file a motion to dissolve in the District Court. *See* note 1, *supra*.

[8] Appellants also sought declaratory relief in the District Court pursuant to 28 U.S.C. § 2201. They have not, however, assigned the District Judge's denial of declaratory relief as an issue for review on appeal and we therefore refrain from indicating any opinion regarding his exercise of judicial discretion. *Cf. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 331 (1961); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494 (1942).

Order of Bernard T. Moynahan, Jr., *D.J.*

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

No. 1276

CHARLES CLARK, ETC., *et al.*,

Plaintiffs,

—v.—

APPALACHIAN VOLUNTEERS IN SERVICE TO AMERICA, *et al.*,

Defendants.

The plaintiffs having moved the Court to remand this cause to the Floyd Circuit Court of Floyd County, Kentucky; and the Court being sufficiently advised;

IT IS NOW THEREFORE ORDERED AND ADJUDGED, in conformity with the Memorandum Opinion this date filed herein, as follows:

(1) That this cause was removed to this Court improvidently and without jurisdiction; and said Motion to Remand is sustained.

(2) That this cause be and the same is hereby remanded to the Floyd Circuit Court of Floyd County, Kentucky.

(3) That the Clerk of this Court shall mail a certified copy of this Order of Remand to the Clerk of the Floyd Cir-

cuit Court of Floyd County, Kentucky, which Court may thereupon proceed with the case.

(4) That the defendants shall pay all properly taxable costs occasioned by reason of the improvident removal of this cause to this Court.

This the 14th day of January, 1970.

BERNARD T. MOYNAHAN, JR.,
Judge.

Opinion of the United States District Court, Eastern District of Kentucky

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

No. 1276

CHARLES CLARK, ETC., *et al.*,

Plaintiffs,

—v.—

APPALACHIAN VOLUNTEERS IN SERVICE TO AMERICA, *et al.*,

Defendants.

This is an action, commenced in the Circuit Court for Floyd County, Kentucky, in which the plaintiffs, the Superintendent of Schools and the Board of Education of Floyd County, seek to enjoin the defendants, Appalachian Volunteers, Inc., Volunteers in Service to America, and named individuals working in and with those organizations, from trespassing or doing violence on the property of the Board of Education. A temporary injunction was issued, *ex parte*, by the Clerk of the Circuit Court, at the commencement of the action.

The defendants have filed a petition for removal of the action to this Court asserting removal jurisdiction (1) under the provisions of 28 U.S.C. 1443 in that the action

> ". . . denies to petitioner's (sic) rights under the laws of the United States providing for equal rights, to wit:

> the right to claim, and to inform and assist others in claiming, the benefits of federally funded benefit programs, in particular the National School Lunch Program . . . ."

and (2), as to certain of the defendants, under the provisions of 28 U.S.C. 1442 in that the action

> ". . . restrains said Volunteers in Service to America being federal officers from effectively undertaking their duties as authorized by Act of Congress 42 U.S.C. 2992 and in particular restraining said federal officers from explaining and implementing rights granted to the people by the Congress."

Although the petition, which alleges that the action was commenced on August 12, 1969, was not verified and was not accompanied by a bond as required by 28 U.S.C. 1446 (a) and (d), a bond and a photocopy of a purported verification were filed shortly after the petition on September 3, 1969. However, the defendants did not file with their petition, or within the time allowed for filing such a petition, a copy of the summons to which they refer in their petition as required by 28 U.S.C. 1446(a).

The plaintiffs have moved the Court to remand the action to the Floyd Circuit Court on the grounds that the defendants failed to file with their petition a copy of all process, pleadings and orders served upon them, that the purported verification of the petition was insufficient, that the petition fails to state facts sufficient to bring the action within the purview of 28 U.S.C. 1443 and that the defendants are not officers of the United States acting under color of office.

The defendants have moved the Court to enter "as of record the termination" of the temporary injunction issued by the Floyd Circuit Court, urging that by the provisions of Rules 81(c) and 65(b), F.R.C.P., upon the filing of the petition for removal herein the injunction became a temporary restraining order which automatically expired 10 days after the filing of the petition for removal. Alternatively, the defendants move for the dissolution of the injunction on constitutional grounds.

The defendants have filed memoranda urging the sufficiency of their petition for removal and supporting their motion for the termination of the temporary injunction. With these memoranda, and subsequent to the time in which an original petition for removal could have been filed, the defendants filed a verification of their petition for removal, and a copy of the summons referred to in the petition.

The cases dealing with the necessity for compliance with the procedural requisites for removal and the effect of a failure to comply with such requisites are not consistent. In *Lorensen v. Jenney Manufacturing Company*, 158 F. Supp. 928 (D. Mass. 1958), the court, in sustaining a motion to remand, stated that a petition for removal which failed to include a copy of the state court process was defective on its face. On the other hand, in *Henlopen Hotel Corporation v. Aetna Insurance Company*, 213 F. Supp. 320 (D. Dela. 1963) the court held that mere technical defects, such as failure to verify the petition, could be cured by amendment and did not require remand to the state court. However the decisions are virtually unanimous that the jurisdictional basis for removal must be pleaded within the time allowed for filing an original petition for removal. While a few jurisdictions allow amendment after said time to

correct defective allegations of jurisdiction, it is well settled that amendments which would add omitted statements of jurisdiction or new grounds for jurisdiction must be filed within the time for filing an original petition for removal. *Rosebery v. Fredell*, 174 F. Supp. 937 (E.D. Ky. 1959); *Young v. Railway Express Agency, Inc.*, 209 F. Supp. 953 (W. D. Ky. 1962); *Akey v. Sears, Roebuck & Company*, 167 F. Supp. 786 (W. D. Mo. 1958). This rule has been applied to actions against officers of the United States. *Jacobs v. District Director of Internal Revenue*, 217 F. Supp. 104 (S. D. N.Y. 1963); *Vendetti v. Schuster*, 242 F. Supp. 746 (W. D. Penn. 1965).

In the instant case the only grounds asserted for removal jurisdiction are that the defendants are, by the state court action, being denied rights under the laws of the United States providing for equal rights and that the action arises from and prohibits conduct which, as to certain of the defendants, is conduct by federal officers acting under color of office. In *Georgia v. Rachel*, 384 U.S. 780 (1966), the Supreme Court stated, at page 792:

> "On the basis of the historical material that is available, we conclude that the phrase 'any law providing for • • • equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under §1443, because the guarantees of these clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that §1443 demands."

The subject petition for removal contains no averments from which it could be inferred that this action in any way involves a denial of racial equality. Hence the petition fails to state a basis for removal jurisdiction under 28 U.S.C. 1443. Further, 42 U.S.C. 2994b specifically provides that, with certain very limited exceptions not relevant to this action, Volunteers in Service to America "shall not be deemed Federal employees and shall not be subject to the laws relating to Federal employment." Any legitimate reading of the foregoing provisions precludes, as a matter of law, a serious contention that Volunteers in Service to America are, in their own right, federal officers within the meaning of 28 U.S.C. 1442. While it may be, as argued by defendants in their memoranda, and as held in *State of Oregon* v. *Cameron*, 290 F. Supp. 36 (D. Ore. 1968) that such Volunteers are persons "acting under" an officer of the United States, the petition for removal in the instant case contains no allegation that any of the defendants were persons acting under an officer of the United States. As the time in which new jurisdictional statements could be added to the petition has long expired, it follows that this action must be remanded to the Floyd Circuit Court. For this reason, it would be improper for this Court to, in any way, interfere with the injunction entered by the state court.

An order will this date be entered in conformity with this Memorandum Opinion.

This the 14th day of January, 1970.

BERNARD T. MOYNAHAN, JR.,
Judge.

Statutes and Regulations Involved

28 U.S.C. §1442. Federal officers sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in

which the defendant was served with process. June 25, 1948, c. 646, 62 Stat. 938.

28 U.S.C. §1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938.

28 U.S.C. §1447. Procedure after removal generally

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(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise. As amended July 2, 1964, Pub.L. 88-352, Title IX, §901, 78 Stat. 266.

28 U.S.C. §1450. Attachment or sequestration; securities

Whenever any action is removed from a State court to a district court of the United States, any attachment or se-

questration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court. June 25, 1948, c. 646, 62 Stat. 940.

Federal Rules of Civil Procedure

Rule 65. Injunctions

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court

may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Rule 81. Applicability in General

* * * * *

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they

do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1083

APPALACHIAN VOLUNTEERS, INC., ET AL. - - - - - - - Petitioners

versus

CHARLES CLARK, ETC., ET AL. - Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

C. KILMER COMBS
207 Caroline Avenue
Pikeville, Kentucky 41501
Attorney for Respondents

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

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October Term, 1970

No. 1083

APPALACHIAN VOLUNTEERS, INC., ET AL. - *Petitioners*

v.

CHARLES CLARK, ETC., ET AL. - - *Respondents*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE QUESTION PRESENTED

Is there any substantial ground for granting the writ under Rule 19 of this Court?

STATEMENT

The statement of petitioners is reasonably accurate insofar as it goes. However, it neglects the action of the petitioners upon which basis they were enjoined in the state court.

It is true that the Vista workers and others discussed the school lunch program with the Superintendent and perhaps some of the members of the County Board of Education prior to the filing of the action in the state court on August 12, 1969.

The petitioners neglect to mention the fact that for some two weeks prior to the filing of the complaint

in state court the Vista workers led a charge to interfere with and interrupt the operation of the Floyd County Board of Education in Prestonsburg, Kentucky. They attacked the Superintendent of Schools bodily and attempted to storm the Administration Building. (See Appendix 1b.) Upon that basis the Vista workers and others were restrained in the state court from entering upon this property.

ARGUMENT

There Is No Basis On Which to Grant the Writ

We think questions two and three, page 2 of the petition, are effectively and decisively answered by the opinion of the United States Court of Appeals, Sixth Circuit, pages 1-16a of the Appendix of the Petitioners.

The respondents also feel that question one, page 2 of the Petition, is also effectively answered by the opinion below. It is clear that 28 USC, Section 1443 (2) granting appeal on remand deals with civil rights "defined in terms of racial equality." Georgia v. Rachel, 384 U. S. 780 (1966), at 384 U. S. 791. Such is not here involved. We are unable to find any justification for granting the writ.

CONCLUSION

This case was carefully considered by the District Court and by the United States Court of Appeals for the Sixth Circuit. The matter is still before the state court and no move has been made to desolve the temporary restraining order as the petitioners are entitled to do under the Kentucky Rules.

It is our feeling that the law as enacted by Congress and as announced by this court has been followed.

Respectfully submitted,

C. Kilmon Combs
207 Caroline Avenue
Pikeville, Kentucky 41501
Attorney for Respondents

FLOYD CIRCUIT COURT

Civil No. 1884

CHARLES CLARK, Individually,
CHARLES CLARK, Superintendent of Schools of Floyd County, Kentucky, and
FLOYD COUNTY BOARD OF EDUCATION — *Plaintiffs*

v.

APPALACHIAN VOLUNTEERS,
VOLUNTEERS IN SERVICE TO AMERICA,
STEVE BROOKS, PAULINE FRANCUM, HERSHELL NICK FRANCUM, NICK MARRADARAS, LINDA GRIDLEY, CONNIE KING, DAVID WALLS, NORMAN THORNBROOK, WOODROW ROGERS, EDWARD BLANKENSHIP, BARBARA NEWSOME, VIRGIL HALL, and Other Persons in Active Concert or Participation With the Named Defendants — *Defendants*

COMPLAINT—Filed August 12, 1969

Plaintiffs say:

1. That Charles Clark is the duly qualified and acting Superintendent of Schools in and for Floyd County, Kentucky, and that the Floyd County Board of Education is a body politic with powers to conduct the business and maintaining an educational system in Floyd County, Kentucky, and supervising and controlling the property owned by the Floyd County Board of Education.

1A. The Floyd County Board of Education at its July 21, 1969 meeting enacted a resolution prohibiting Vista workers and Appalachian Volunteers from using or occupying any schools or school property in Floyd County.

Said resolution is as follows:

"WHEREAS, the Floyd County School System has demonstrated it's desire to work with Appalachian Volunteers, and Vista Volunteers long after other school systems have thrown up their hands in disgust and,

WHEREAS, as school people, we have volunteered our facilities and time to properly orientate volunteer groups so that they might better understand our problems and thereby arrive at possible workable solutions and,

WHEREAS, too many Vista and other volunteers have demonstrated a complete lack of knowledge of our people and their sense of what is decent in manners and dress and,

WHEREAS, although, the main office of the Appalachian Volunteers is located within a hundred yards of our administrative offices, and has been so located for a two year period, we have never met the director or his co-workers face to face, although, we were hearing of their activities in rural areas. These activities seemed to have been directed toward discrediting all local officials and agencies and,

WHEREAS, the Vista Volunteers and Appalachian Volunteers have been sustained by OEO and private foundation funds for several years, a great majority of Floyd Countians cannot find a single tangible evidence of a worthwhile idea or act attributable to them and,

WHEREAS, it appears that the two volunteer groups mentioned above have through willful ignorance misled some of our residents into extreme suspicion of all local agencies and elected officials to the point where

we are no longer able to help them or indeed to reason with them and,

Whereas, despite our long history of efforts to cooperate with the two groups mentioned above, to our sorrow and utter disgust, because their activities have lead to a situation where our defending ourselves and the democratic processes take so much of our limited time, that we may be missing some opportunities for proper leadership and,

Whereas, although we take this action reluctantly, it must be admitted that we are not guilty of haste after three or four years of trying to cooperate in vain and we are clearly forced into the following action and,

Now Therefore, be it resolved that this Floyd County Board of Education go on record as declaring all schools and school property off limits to the Vista and Appalachian Volunteers and that the Superintendent be ordered to notify all school personnel of this action and that copies of this resolution be sent to the volunteer groups in question as well as all concerned local, state and federal officials.

Motion by Mr. Blair seconded by Dr. Allen that the above resolution be adopted.

Voting for the Motion	Voting against Motion
Mr. Stumbo	None
Dr. Allen	
Mr. Blair	

Approved: August 2, 1969

By: /s/ John M. Stumbo
Chairman

/s/ Charles Clark
Secretary"

2. For the past two (2) weeks, and in increasingly large numbers, the defendants, and/or some or all of them and those acting in concert and active participation with them, have congregated upon property owned by the Floyd County Board of Education on Second Avenue in Prestonsburg, Kentucky, where the plaintiffs maintain their administrative offices. They have interfered with the orderly conduct of the business of the Floyd County Board of Education and have attempted to enter into the building and trespass upon the property of the Floyd County Board of Education. They have done bodily harm to Charles Clark, individually, and as Superintendent of Schools of Floyd County, Kentucky.

3. They are threatening to continue to harass and intimidate these plaintiffs and to trespass upon the property of the Floyd County Board of Education and to interfere with the orderly operation of the school system of Floyd County, Kentucky, and they have threatened to, and will do bodily harm to the Superintendent of Schools and to the other school employees unless they are so restrained from so doing by proper orders of this court.

4. All of the acts of misconduct on the part of these defendants, and those participating with them, were wilful, malicious, wrongful and unlawful and were calculated to, and did, interfere with the Floyd County Board of Education and the Superintendent of Schools and its other employees in the performance of their duties.

5. The defendants have threatened to continue to harass, intimidate, picket and thwart the efforts of the Floyd County Board of Education to carry on its business and these defendants have demonstrated by word and act that they intend to do bodily harm to the Superintendent of Schools and other employees and that irreparable harm, damage and injury will follow and be done to the plaintiffs unless the acts and conduct of the defendants are enjoined and they are so restrained from so doing.

6. These plaintiffs have no adequate remedy at law, or otherwise, for the harm and damage done, or threatened to be done by the defendants because the defendants will continue the harassment and interference as hereinabove set out to the detriment of the school system of Floyd County, Kentucky, which cannot be measured in monetary damages.

7. No injunction or restraining order has been asked, granted or refused by this or any other court.

8. The Hon. Hollie Conley, Judge of the Floyd Circuit Court, is absent from Floyd County and the defendants will continue to harass and intimidate and do physical damage and harm to the property of the plaintiffs and the persons of its employees.

9. The plaintiffs' rights are being, and will be violated by the defendant and the plaintiffs will suffer immediate and irreparable injury, loss and damage before notice can be served and a hearing be had thereon.

WHEREFORE, plaintiffs demand that the defendants, and each and all of them, and those acting in concert with, and collectively, and individually, be enjoined from trespassing upon any property under the ownership, control or operation of the Floyd County Board of Education and in any wise interfering with the Floyd County Board of Education in the exercise of its control of the school properties in Floyd County, Kentucky, and from interfering with the Floyd County Board of Education, its agents and employees, and Charles Clark, Superintendent of Schools, in the performance of their duties in connection with the operation of the school system of Floyd County; that they recover their costs and be granted all proper relief.

/s/ W. W. BURCHETT
Prestonsburg, Kentucky
Attorney for Plaintiffs

State of Kentucky)
County of Floyd) Set.

The undersigned says that the statements contained in the foregoing Complaint are true as he verily believes.

Subscribed and sworn to before me by _____ this _____ day of August, 1969.

NOTARY PUBLIC, STATE AT LARGE, KENTUCKY.

Com. Exp. 4/9/72.